

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

77 2110

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES ex rel. MARTHA CARMONA, and ROBERTA FOWLER,
Petitioners-Appellees,

-against-

BENJAMIN WARD, Commissioner of the New York State Department
of Correctional Services; FRANCES CLEMENT, Superintendent,
Bedford Hills Correctional Facility, Bedford Hills, New York;
FRANK CALDWELL, Acting Chairman of the New York State Board
of Parole; and the NEW YORK STATE BOARD OF PAROLE,

Respondents-Appellants.

On Appeal from the United States District Court
for the Southern District of New York

APPELLEE'S PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC

Of Counsel:

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
BY ARTHUR L. LIMAN
MARK C. MORRIL
345 Park Avenue
New York, New York 10022

ELIZABETH BARTHOLET
Cambridge, Massachusetts

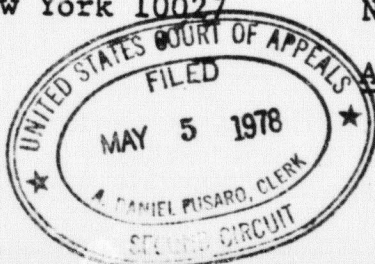
MICHAEL MELTSNER
435 West 116 Street
New York, New York 10027

DEBORAH M. GREENBERG
MARGARET K. BROOKS
HARLON L. DALTON
(Legal Action Center of the
City of New York, Inc.)
271 Madison Avenue
New York, New York 10016
(212) 679-6502

LAWRENCE S. GOLDMAN
60 East 42 Street
New York, New York 10017

WASHINGTON SQUARE LEGAL SERVICES
BY E. JUDSON JENNINGS
80 Fifth Avenue
New York, New York 10011

Attorneys for Petitioner-Appellees



UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO. 77-2110

UNITED STATES ex. rel. MARTHA CARMONA, and ROBERTA FOWLER,

Petitioners-Appellees,

-against-

BENJAMIN WARD, Commissioner of the New York State Department of Correctional Services; FRANCES CLEMENT, Superintendent, Bedford Hills Correctional Facility, Bedford Hills, New York; FRANK CALDWELL, Acting Chairman of the New York State Board of Parole; and the NEW YORK STATE BOARD OF PAROLE,

Respondents-Appellants.

On Appeal from the United States District Court
for the Southern District of New York

APPELLEES' PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC

Introduction

The sole question presented by this appeal is whether the mandatory life sentences imposed under the 1973 New York drug law on Martha Carmona for the possession of an ounce of cocaine and on Roberta Fowler for the sale of .00455 ounce of cocaine constitute cruel and unusual punishment. A panel of this Court, with Judge Oakes dissenting, reversed a district court determination that these sentences violate the Eighth Amendment to the United States Constitution.

Petitioners-Appellees (hereinafter "appellees") Martha Carmona and Roberta Fowler hereby petition the Court for a rehearing. As set forth more fully below, the panel's decision fails to accord full respect to recognized standards of Eighth Amendment adjudication, and to the extent that it addresses those standards, errs in its application of them. Inasmuch as the panel's decision involves important questions of public policy and the administration of justice, and is of immediate interest and concern to the general public and to a substantial class of persons directly affected by it, appellees respectfully suggest that the case be reheard en banc.

Statement of the Case

In January 1975, Martha Carmona pleaded guilty to charges brought under the 1973 drug law of criminal possession of a controlled substance in the second degree, specifically, possession of an ounce of a substance containing

cocaine.^{1/} She had no prior criminal record save a non-drug-related arrest 19 years earlier. At the time of her sentencing on a federal drug charge brought at about the same time as the state charge here at issue,^{2/} the district court judge concluded that Carmona "was a small pusher of cocaine in small quantities; there does not seem to be any evidence of any large scale drug sales, even with respect to the state court conviction, as I see it." United States v. Carmona, 74 Cr. 510, transcript of proceedings, March 26, 1976 at 4. The Assistant United States Attorney assigned to the federal case concurred: "She is not by any stretch of the imagination a high-level narcotic trafficker, I don't believe, from what her record shows, and the individuals that worked on it, that being the Task Force...". Id., transcript of proceedings, September 29, 1975 at 8. Nevertheless, New York State sentenced Carmona to a term of imprisonment of six years to life.^{3/}

^{1/} The 1973 drug law classifies offenses in terms of the number of ounces of narcotic possessed or sold. However, the drug law is keyed to the weight of the aggregate substance possessed or sold rather than the weight of the pure narcotic.

^{2/} In 1974, Carmona was indicted on and pleaded guilty to both state and federal charges of cocaine possession. The federal sentence--one year incarceration and three years special parole to run concurrently with the state sentence--is not at issue in this proceeding.

^{3/} According to standard life expectancies, her sentence of life imprisonment amounts to 40.5 years. Carmona v. Ward, No. 77-2110, slip op. at 2647, 2673 n.3 (2d Cir. April 21, 1978).

In February 1974, Roberta Fowler was convicted by an Albany County jury of criminal sale of a controlled substance in the third degree, specifically, 0.13 gram (.00455 oz.) of a substance containing cocaine (approximately one dose with a street value of about \$20). The district judge in the instant proceedings found that "[a]t the time of sentence, Ms. Fowler, then twenty years of age, had no previous record of violent behavior or of a criminal possession or sale of narcotics, although she was not a stranger to the criminal justice system." Carmona v. Ward, 436 F.Supp. 1153, 1159 (S.D.N.Y. 1977). Nevertheless, she was sentenced by the state court to a term of imprisonment of four years to life.^{4/}

The judge who sentenced Fowler, like the judge who sentenced Carmona, was required by the 1973 Drug Law to sentence her to a maximum of life imprisonment. Under the drug law, a mandatory life sentence must be imposed on all who, like Fowler, are convicted of sale of, or possession with intent to sell any amount of any narcotic, including cocaine. It also must be imposed on all who, like Carmona, are convicted of possessing an ounce or more of any narcotic.

In December 1975, Martha Carmona petitioned the District Court for a writ of habeas corpus challenging the constitutionality of various provisions of the 1973 drug

^{4/} According to standard life expectancies, her sentence of life imprisonment amounts to 54.6 years. Slip op. at 2673 n.3.

law. The following month, Roberta Fowler intervened as a petitioner. Following a two-day bench trial, District Judge Constance Baker Motley issued an Opinion declaring that the maximum sentences of life imprisonment imposed upon Carmona and Fowler were so disproportionately severe in relation to the gravity of the offenses of which they were convicted as to constitute cruel and unusual punishment. Carmona v. Ward, 436 F.Supp. 1153 (S.D.N.Y. 1977).

The Panel's Opinion

The panel, with Judge Oakes dissenting, reversed. At the outset of its Opinion, the majority purported to accept the general proposition advanced by the court below that "punishment which is disproportionate to the gravity of the crime committed is violative of the Eighth Amendment" (slip op. at 2653), and that a sentence of imprisonment may, solely because of its length, constitute cruel and unusual punishment. (Slip op. at 2655). Indeed, as Judge Oakes illustrates in his dissent, this "proportionality" principle is firmly rooted in both state and federal decisional law, and was sanctioned by the United States Supreme Court as long as as 1910. (Slip op. at 2679-82) (dissent).

Similarly, the majority voiced agreement with the court below (and with three other Circuits) on a tripartite test for determining whether a particular sentence is disproportionate to the crime committed, its elements being: "1) a judgment on the seriousness of the offense; 2) a comparison of the punishment imposed with that fixed

for other crimes within the jurisdiction; and 3) a comparison of the sentence under review with those authorized in other jurisdictions for the same crime." (Slip op. at 2655-56). However, as Judge Oakes observed, "[t]hough the majority purports to apply this rubric, in reality it glosses over the three basic elements. It fails first to focus on the actual crimes of these two appellees, emphasizing instead the general evils of drugs and drug trafficking. Second, in comparing the sentences imposed by the Legislature in connection with the New York crimes, the majority does not mention more serious crimes which carry lesser sentences in New York State. Finally, the majority makes no real comparison with the sentences imposed by other states for drug crimes, conclusorily stating instead that the problems created by drugs are greater in New York than in other states, a matter of which the majority takes judicial notice." (Slip op. at 2682-83) (dissent). Furthermore, before it embarked on its ostensible review of appellee's sentences, the majority failed to resolve properly "the fundamental question of precisely what sentence is to be evaluated...". (Slip op. at 2673-74) (dissent).

A. The Sentence

Although the majority described the "major question on appeal" as being "whether the mandatory maximum sentence of life imprisonment imposed on appellees is unconstitutional under the Eighth Amendment" (slip op. at 2653) (footnote omitted) (emphasis added), it left that question unanswered.

Instead, it "discount[ed] the life sentence by the 'probability of parole' and test[ed] the constitutionality of that ill-defined lesser sentence." (Slip op. at 2674) (dissent). This refusal to assess the constitutionality of appellees' maximum sentences is contrary to New York law as construed by its highest court, People v. Broadie, 37 N.Y. 2d 100, 371 N.Y.S. 2d 471, cert. denied, 423 U.S. 950 (1975), contrary to the law in other jurisdictions, In re Lynch, 8 Cal. 3d 410, 419, 503 P.2d 921, 927 (1972) (en banc); Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), cert. denied, U.S. 938, 983 (1973); Rummel v. Estelle, No. 76-2946, slip op. at 2580, 2583 (5th Cir. March 6, 1978), contrary to common sense, and jurisprudentially unsound.

The New York Court of Appeals considered this question in People v. Broadie, supra. Although the majority in general relied heavily on the mode of analysis employed by the Broadie court in upholding the challenged sentencing provisions, it rejected that court's conclusion that the sentence which should be analyzed is the mandatory lifetime maximum. 37 N.Y. 2d at 110-11. The majority's stated reason for so doing--that since Broadie was decided, the drug law has been amended to create a possibility of eventual discharge from parole--is, as Judge Oakes makes clear, a "distinction [that] does not make a difference.... That a Class A drug felon might be discharged from lifetime parole in the exercise of the parole board's discretion does not take away from the proposition that any violation

of parole prior to the actual exercise of the parole board's discretion subjects the felon to the full life term." (Slip op. at 2676) (dissent). And although appellees "might be paroled and discharged from parole before the expiration of their full terms..., both parole and discharge from parole are within the discretion of the parole board, so that it is also possible that appellees might never be paroled or discharged from parole." (Slip op. at 2678) (dissent) (footnotes omitted). "The threat [of the severest sanction] makes the punishment obnoxious." Trop v. Dulles, 356 U.S. 86, 102 (1958).

To observe that appellees might not be released on parole, might not be discharged from parole, or might violate one of the myriad conditions of parole is not, as the panel suggests, to submit that appellees are "so incorrigible that they must be deemed destined to duration vile for the rest of their natural lives...." (Slip op. at 2665). Rather, it is a recognition of the arbitrariness of parole release and discharge determinations, and of the stringency and pettiness of the conditions that commonly attach to parole. See Brief of Petitioners-Appellees at 68-75.

Perhaps the most compelling reason for focussing on the lifetime sentence is because, as Judge Oakes illustrated, to do otherwise "will inevitably enmesh federal courts in parole discharge decisions." (Slip op. at 2677) (dissent). If lifetime sentences for a particular crime are unconstitutional but lesser sentences are not, "then the determination

of some lesser sentence's constitutionality--lesser by virtue of the possibility of discharge from parole--would ultimately depend on federal court entanglement in state decisions denying discharge." Id., cf. Rummel v. Estelle, No. 76-2946, slip op. at 2580, 2583 (5th Cir. March 6, 1978) (rejecting Texas' claim that possibility of parole prevents evaluation of constitutionality of life imprisonment imposed pursuant to Texas' recidivist statute).

B. Seriousness of the Crimes

Just as the majority failed to come to grips with the life sentences actually imposed on appellees, it failed to compare those sentences to the actual offenses of which Carmona and Fowler stand convicted: possession of an ounce of cocaine and sale of .00455 ounce. Rather, it held appellees to account for every possible evil attendant to, and consequence flowing from, widespread drug abuse and drug trafficking. In so doing, the panel swept aside the district court's conclusion that "a penalty cannot be justified solely by the potential [of that crime] for more serious conduct, even though it be violent or dangerous." 436 F.Supp. at 1169.^{5/} Nor did the majority feel constrained by the fact

^{5/} In rejecting the district court's conclusion, the panel relied on McQuoid v. Smith, 556 F.2d 595, 599 (1st Cir. 1977) for the proposition that "[s]ociety has a right to prohibit and punish not only overtly criminal conduct but other conduct which creates danger, or a sufficient probability of danger, to the community at large." However, a reading of McQuoid reveals that reliance on it is misplaced. There, the appellant challenged a Massachusetts statute fixing
(footnote continued next page)

that the United States Supreme Court reached a similar conclusion in Coker v. Georgia, 97 S.Ct. 2861, 2869 (1977) (rape, though sometimes accompanied by serious injury to or the death of another person may not be punished as though always accompanied by murder). Rather, the majority suggested, without help from the text of Coker itself, that Coker has no application to non-capital punishment cases. (Slip op. at 2661 n.9).^{6/}

The majority's focus on collateral crimes is particularly inappropriate where, as here, the feared crimes are punished less severely than are the crimes actually committed. Judge Oakes put it succinctly:

(footnote continued)
a mandatory minimum sentence of one year for the crime of carrying a firearm without a license. Appellant unsuccessfully claimed that his one-year sentence constituted cruel and unusual punishment. He also urged that the statute violated the Due Process Clause because it imposed strict liability, required no mens rea, and consequently risked ensnaring persons "whose designs are not, in the ordinary sense, criminal". Id. The passage quoted by the panel on this appeal was the First Circuit's response to this due process claim.

^{6/} In assessing this reverse "death is different" argument, it is useful to consider Circuit Judge Charles Clark's observation in Rummel v. Estelle, supra at 2583, that life imprisonment is different.

In most jurisdictions, a sentence to imprisonment for life now stands in the place where the death penalty stood earlier in this century --the ultimate punishment imposed by this society for those crimes most abhorrent to it. Therefore, the question of the proportionality of Rummel's life sentence to the crime of which he was convicted deserves a consideration which may be unnecessary for a lesser sentence.
(footnote omitted)

The majority finds the crimes involved here more serious than they first appear on the basis that drug use and trafficking foster other crimes. Drug involvement may well engender the collateral crimes of robbery, burglary and prostitution; so do other evil habits, social or economic inequality or just plain greed. However, the maximum prison term in New York for first degree robbery and first degree burglary is twenty-five years; and prostitution carries a maximum prison sentence of three months. Surely it makes little sense to argue, as the majority seems to do, that a more severe punishment may be imposed for an act because it may lead to the commission of other crimes than may be imposed for those crimes themselves.

(Slip op. at 2685-86) (dissent) (footnotes omitted). Indeed, it is as if in McQuoid v. Smith, supra, note 5, possession of a firearm were punished more severely than murder, on the theory that the one may lead to the other.

The majority refused to differentiate between persons who possess or sell small amounts of cocaine on the one hand, and large-scale traffickers on the other. "We conclude that the legislature could only properly judge the severity of the crime involved by considering the well understood and undisputed operating procedures of the dirty business involved and its disastrous consequences." (Slip op. at 2663) (footnote omitted). After describing the process by which illicit drugs travel down a distribution chain from the importer or manufacturer to the ultimate consumer, the panel opined that "[t]he entire system depends upon ultimate disposition by sellers such as the defendants here, who as Judge Breitel has pointed out are, 'the crucial link' in the pernicious cycle spawning the addiction which creates other sellers." (Slip op. at 2662) (citation omitted).

This "crucial link" analysis, like the collateral crimes approach, simply proves too much. The same inverted logic that dictates that the small seller be punished as severely as the major importer because without the former the latter could not survive, would support the imprisonment for life of drug addicts because without them big time traffickers could not survive. This approach overlooks a fundamental principle of our justice system: individuals are to be held accountable for their own conduct and not for the remotely related conduct of others or the ills of society. Unlike recidivist statutes, which punish individuals for their own (albeit prior) behavior (see slip op. at 2661 n.9), the mandatory life sentences at issue here were upheld by the majority on the theory that appellees should be held responsible for "the slow undermining of societal values and rules believed to be necessary to enable men to live together in peace...". (Slip op. at 2661) (citation omitted). Although selling narcotics may be unlawful, being a "crucial link" at the bottom of the distribution chain should not, without more, subject a person to criminal liability for "the drug problem" in its entirety. Cf. Kotteakos v. United States, 328 U.S. 750, 772-75 (1946) (because guilt remains individual and personal even in conspiracy cases, eight or more conspiracies related in kind but connected solely by a common participant may not be tried together).

C. Other Crimes in this Jurisdiction

The panel acknowledged that the only non-drug crimes which carry mandatory life terms in New York are first and second degree murder, first degree arson (intentionally damaging a building by explosion when another is within), and first degree kidnapping (abduction for the purpose of extortion or abduction where the victim dies).^{7/}

Among the offenses punished substantially less severely by New York than possession of an ounce of cocaine or sale of .00455 ounce are: first degree rape (sexual intercourse by forcible compulsion or with a female who is physically helpless or less than eleven years old), first degree manslaughter (homicide with intent to cause serious physical injury), second degree kidnapping (abduction), second degree arson (intentionally damaging a building by fire when a person is within), first degree robbery (armed robbery), first degree burglary (armed burglary), and assault in the first degree (intentionally causing serious injury to another with a deadly weapon, intentionally disfiguring or disabling a person).^{8/} The panel noted these disparities but shrugged them off, stating: "Drug trafficking and its attendant evils posed an imminent threat to the community

^{7/} N.Y. Penal Law §§125.27, 125.25, 150.20, 135.25. Descriptions provided in parenthesis are not necessarily complete.

^{8/} N.Y. Penal Law §§130.35, 125.20, 135.20, 150.15, 160.15, 140.30, 120.10.

which the legislature could reasonably consider to be comparable to or of greater import than arson, kidnapping, manslaughter or rape. We cannot sensibly characterize that determination as arbitrary or irrational." (Slip op. at 2667) (footnote omitted).

D. This Crime in Other Jurisdictions

It is conceded by one and all that the 1973 drug law is the harshest in the nation:

[N]o other jurisdiction in the United States prescribes a mandatory life sentence for sale of one ounce or less of cocaine. Indeed, only six states have statutes permitting a court to consider imposition of a life sentence on a first felony offender. The most common maximum permitted is between ten and twenty years and not one of the thirty-four states in this range requires imposition of the maximum term. Neither Fowler nor Carmona would have faced a mandatory sentence of life imprisonment under the law of any other state. As for Carmona, in thirty-one states the maximum penalty provided by law is less than the minimum sentence which she is serving.

(Slip op. at 2686-87) (dissent) (footnotes omitted). Again, the majority was unfazed by the comparison. It justified the disparity by reasoning that "the plague which is here under attack is most virulent in New York and the response of that state was predictably more harsh". (Slip op. at 2668). Thus, the majority implicitly relied on the "fact", of which it took judicial notice, that New York is the "[drug] capital of the United States". (Slip op. at 2668). This simply is not true. Three California cities, San Francisco, Los Angeles, and San Diego, rank first, second and fourth in the nation in heroin addicts per capita, according to

a report released recently by the National Institute on Drug Abuse of the United States Department of Health, Education and Welfare. Person, Retka & Woodward, "A Method for Estimating Heroin Use Prevalence," NIDA Technical Paper C77-8 (October 1977). Arizona, Michigan, Illinois and Texas each boast a city ranking higher than New York. Id.

More fundamentally, however virulent New York's drug problem, Martha Carmona and Roberta Fowler "were not prosecuted for having initiated the phenomenon. They have participated only at the very lowest level of the scale." (Slip op. at 2683) (dissent). Whatever New York's drug problem, it cannot constitutionally treat each of the thousands of people peripherally caught up in it as though they were solely and ultimately responsible for the problem in its entirety.

CONCLUSION

Judge Oakes succinctly summed up appellees' position on the merits.

It is true that there must be room for legislative discretion, particularly in dealing with the serious drug problem in the State and the City of New York. See 436 F.Supp. at 1168. But the remedies which the legislature fashions must comply with the demands of the Constitution.

...

Unconstitutional laws cannot be allowed to stand simply out of deference to the legislature. At some point a given penalty may by virtue of its inordinate length be cruel and unusual. Once one analyzes the sentences here imposed in the cool light of reason and considers the specific crimes involved, the relation of the sentences to those for other crimes in the state and to those for the same crimes in other states, life imprisonment is simply too much to withstand constitutional scrutiny.

(Slip op. at 2688-89) (dissent).

Inasmuch as the issues raised on this appeal are of grave public importance and involve considerations never squarely considered by this Court, appellees respectfully suggest that the appeal be reheard en banc.

Dated: New York, New York
May 5, 1978

Of Counsel:

PAUL WEISS, RIFKIND,
WHARTON & GARRISON
by ARTHUR L. LIMAN
MARK C. MORRIL
345 Park Avenue
New York, New York 10022

ELIZABETH BARTHOLET
Cambridge, Massachusetts

MICHAEL MELTSNER
435 West 116th Street
New York, New York 10027



DEBORAH M. GREENBERG
MARGARET K. BROOKS
HARLON L. DALTON
(Legal Action Center of the
City of New York, Inc.)
271 Madison Avenue
New York, New York 10016
(212) 679-6502

LAWRENCE S. GOLDMAN
60 East 42nd Street
New York, New York 10017

WASHINGTON SQUARE LEGAL SERVICES
By E. JUDSON JENNINGS
80 Fifth Avenue
New York, New York 10011

Attorneys for Petitioners-Appellees

5/5

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----- X
MARTHA CARMONA, et al., :
Petitioners-Appellees, : AFFIDAVIT OF SERVICE
-against- :
BENJAMIN WARD, et al., : No. 77-2110
Respondents-Appellants. :
----- X

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

STELL LORIN, being duly sworn, deposes and says:

1. That she is a secretary in the office of Deborah M. Greenberg, one of the attorneys for petitioners-appellees in the above-captioned action.

2. That on the 5th day of May, 1978, she served two copies of the Appellee's Petition for Rehearing and Suggestion for Rehearing En Banc by depositing them in the United States mail, postage prepaid, addressed to said attorneys at their last known addresses as indicated below:

Louis J. Lefkowitz
Attorney General of the State of New York
Two World Trade Center
New York, New York 10047
(Attn: Gerald J. Ryan)

Sol Greenberg, Esq.
District Attorney of Albany County
Albany County Courthouse
Albany, N.Y. 12207

Stell Lorin

Stell Lorin

Sworn to before me
this 5th day of May, 1978

Pauline Reinish

Notary Public

PAULINE REINISH
Notary Public, State of New York
No. 4631656
Qualified in Bronx County
Commission Expires March 30, 1980